# STATE OF MICHIGAN

# COURT OF APPEALS

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STEVEN A. SCHAFER,

Plaintiff-Appellee,

v

DENISE M. FEDEWA, formerly known as DENISE M. SCHAFER

Defendant-Appellant.

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UNPUBLISHED
January 28, 2003

No. 240402
Ionia Circuit Court
LC No. 98-019402-DM

Before: Sawyer, P.J., and Gage and Talbot, JJ.

GAGE, J. (*dissenting*).

I respectfully dissent. While I agree that this matter has been complicated by the procedural anomalies, I do not believe that the procedural events are so very extraordinary as to override the primary concern in any child custody dispute, that being the best interests of the child. See *Hawkins v Murphy*, 222 Mich App 664, 674; 565 NW2d 674 (1997).

Accepting the majority's recitation of events as true, I turn first to my brothers' expression of "puzzlement" that the trial court held a hearing regarding custody in the absence of a new petition to change custody. Defendant did not raise this issue on appeal and I am puzzled that it is being discussed. Counsel and the majority take issue with the petition for change of custody being filed six days after entry of the final judgment. Be that as it may, the court looked to the petition as relating back to the November 8 stipulated order of custody.

Complicating the procedural format of this case is the fact that defendant's prior counsel and plaintiff's counsel had never agreed to finalization of the custody stipulation. They had agreed to get the divorce concluded and judgment entered in an expedited manner to accommodate defendant's new relationship with a boyfriend. Both parties recognized they had to go through the Friend of the Court process eventually and they could do it after the Judgment of Divorce was entered. The divorce judgment was entered on March 3, 2000. Apparently it was not unusual for the local legal community to handle protracted custody disputes after judgment was entered.

In July 2001, the court held a *de novo* hearing. The Court found that a change of circumstances had taken place "since the November 8, 1999 custody order and since the judgment of Divorce and since the January 17, 2001 supplemental Friend of the Court recommendation and order," including but not limited to the children being one year older and

the consensual change of custody of the two older siblings. Thus, assuming for the sake of argument that defendant's unpreserved issue respecting the trial court's lack of authority to bifurcate divorce trials had merit, it would not have any impact on the outcome of this case given the court's ruling regarding the importance of reaching a final resolution of the custody issue. MCL 722.27.

I acknowledge that the procedural history of this case is astounding. However, we must not forget that the overriding concern in any custody dispute is the best interests of the child. Because custody disputes are fluid in nature and are never really etched in stone, I believe our focus should be on the correctness of the Court's decision. Therefore, this Court's attention should be directed toward review of the best interest factors of MCL 722.23(a) – (l). Defendant argues that the trial court erred in its findings with respect to these factors. When reviewing custody cases, we affirm all orders and judgments of the circuit court "unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994). The trial court found an established custodial environment existed with defendant; therefore, plaintiff had the burden to prove that a change would be in the child's best interests by clear and convincing evidence. *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). The factors to be considered by the Court in determining the best interests of the child for the purpose of making custody determinations are set forth in MCL 722.23(a)-(l). The trial court held in a detailed analysis that the parties were equal in factors a, c, e, f, h, and i. I will address, therefore, only those four factors in which plaintiff prevailed, because there were no factors in which defendant prevailed.

Factor (b) is the "capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b). The trial court weighed this factor in favor of plaintiff because evidence indicated that defendant was unable to discipline the children without screaming profanities at them. Although there was evidence of occasional physical discipline on the part of the father, defendant-mother also admitted to striking her son with a wooden spoon.

Factor (d) is the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." The trial court held that this factor strongly favored plaintiff. MCL 722.23(d). The trial court's lengthy findings indicate that regardless how long the child had lived with defendant, that environment was not satisfactory, and maintaining that situation would not have been desirable.

Factor (g) is the "mental and physical health of the parties involved." MCL 722.23(g). The court found that this factor favored plaintiff in light of defendant's mental health issues, specifically, her compulsive cleaning habits, anxiety, depression, tendency to scream profanely at the children, and poor scores on the parent-child profile. Although the court noted that there was some evidence to the contrary, that evidence was based on defendant's own evaluation of her situation rather than from testing or outside observations. In contrast, the court found that plaintiff's tests indicated that he was agreeable, reasonable, listens, and was within the normal range for aggressiveness.

Defendant argues that the trial court ignored her counselors' testimony that she had worked to improve her situation since her unfavorable test results nearly two years earlier.

However, taped evidence indicated that defendant was still screaming profanely at her children shortly before the hearing. Furthermore, plaintiff's psychologist testified that he had met with the parties frequently since the tests were completed, and opined that the results were still valid "to a greater rather than a lesser extent." Although the trial court did not discuss the favorable evidence beyond noting that it existed and was chiefly reported by defendant herself rather than being derived from a formal test or evaluation, the court was not required to comment on each piece of evidence or accept or reject every proposition argued. *LaFleche v Ybarra*, 242 Mich App 692, 700; 619 NW2d 738 (2000).

Factor (j) is the "willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." MCL 722.23(j). The trial court determined that this factor favored plaintiff, partly on the basis of a psychologist's testimony, and partly because defendant repudiated a visitation agreement the day after it was reached and did nothing thereafter to help the child spend time with plaintiff.

Defendant argues that the trial court's finding ignored evidence showing plaintiff's lack of cooperation with regard to this factor. To support her argument, defendant lists a number of occasions on which plaintiff allegedly refused to allow the children to see or talk to defendant. However, these acts do not outweigh defendant's refusal to cooperate with the court's order to allow visitation time with plaintiff, particularly taken together with defendant's threat to report plaintiff for kidnapping after plaintiff picked the child up from defendant's house when she left him unsupervised. Therefore, the trial court's finding should be affirmed.

Regardless of the procedural history, because the trial court's findings of fact respecting the best interest factors were not contrary to the great weight of the evidence, and because its ultimate custody decision was not an abuse of discretion, I would affirm the court's decision to grant plaintiff's motion for a change of custody.

/s/ Hilda R. Gage